STATE OF MICHIGAN
IN THE SUPREME COURT

KERRY JENDRUSINA,

Plaintiff-Appellee

v.

SHYAM MISHRA, M.D. and SHYAM N. MISHRA, M.D., P.C., jointly and severally,

Defendants-Appellants.

Supreme Court No. 154717

Court of Appeals Case No. 325133

Macomb County Circuit Case No. 13-3082-NH

BRIEF OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

KERR, RUSSELL AND WEBER, PLC
Joanne Geha Swanson (P33594)
Jacquelyn A. Klima (P69403)
Attorneys for Amicus Curiae
Michigan State Medical Society
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200; FAX (313) 961-0388
E-mail: jswanson@kerr-russell.com

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF QUESTION PRESENTED

The question raised by the Application is whether this Court should grant leave to consider and ultimately reverse the published, non-unanimous decision of the Court of Appeals in *Jendrusina v Mishra* which, in deciding whether plaintiff discovered his claim within six months prior to filing the complaint, departs from the standard established by this Court in *Solowy v Oakwood Hosp* by (1) changing the standard from "possible claim" to "likely" or "probable" claim, (2) requiring sophisticated knowledge of the existence of causation, and (3) failing to enforce the due diligence requirement and the standard of reasonableness?

The Court of Appeals would say "no."
The Circuit Court would say "no."
Plaintiffs-Appellees would say "no."
Defendants-Appellants would say "yes."
Amicus Curiae Michigan State Medical Society would say "yes."

STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Defendants-Appellants Shyam Mishra, M.D. and Shyam N. Mishra, M.D., P.C., seek leave to appeal from the non-unanimous Michigan Court of Appeals' decision in *Jendrusina v Mishra*, 316 Mich App 621; _ NW2d _ (2016),[1] which reversed the trial court's grant of summary disposition under the six-month statute of limitations discovery rule. MSMS respectfully joins Defendants in urging the grant of leave and the ultimate reversal of the *Jendrusina* decision.

INTEREST OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY

Amicus Curiae Michigan State Medical Society ("MSMS") is a professional association which represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS has frequently been afforded the privilege of acting as *amicus curiae* with respect to legal issues of significance to the medical profession. Important issues involving the discovery provision of the medical malpractice statute of limitations, particularly as applied by this Court in *Solowy v Oakwood Hosp*, 454 Mich 214; 561 NW2d 843 (1997), are raised by the non-unanimous opinion in *Jendrusina v Mishra*, 316 Mich App 621; _ NW2d _ (2016).

In reversing the trial court order granting summary disposition for Defendants, the *Jendrusina* majority (Gleicher, PJ, and Shapiro, JJ) modified the discovery standard this Court established in *Solowy*, which held that the discovery rule set forth in MCL 600.5838a(2) is triggered when, on the basis of objective facts, the plaintiff knew or should have known of a *possible* cause of action (an injury and its possible cause). Contrary to the *Solowy* standard, the

[1] Because the Michigan Appellate Reports page numbers are not yet available, citations to the *Jendrusina* opinion will use the Westlaw page numbers. A copy of the opinion is attached as Exhibit A.

Jendrusina majority said that "the inquiry is not whether it was *possible* for a reasonable lay person to have discovered the existence of the claim; the inquiry is whether it was *probable* that a reasonable lay person would have discovered the existence of the claim" (italics in original). 316 Mich App at 2.

Using the term "claim" in conjunction with "probable" makes discovery contingent upon knowledge of a "probable claim," raising the discovery threshold and making it easier for plaintiffs to meet their burden of showing that they did not discover the existence of the claim more than six months prior to filing suit. Although later in the opinion, the *Jendrusina* majority repeated the correct standard, it nonetheless failed to apply it.

Beyond that, while the discovery statute expressly places the burden of proof on the plaintiff to show that he or she did not discover, or should not have discovered, the existence of a claim more than six months prior to filing, the *Jendrusina* majority shifts the burden to the defendant, who must now demonstrate that a reasonable lay person would have known enough about the sophisticated indicators of his or her medical condition to have been deemed to have discovered the claim.[2] The *Jendrusina* majority also rests discovery upon the acquisition of sophisticated knowledge of causation, and fails to enforce the due diligence requirement and the standard of reasonableness.

These issues are of immense importance to MSMS and its member physicians, who are understandably concerned that *Jendrusina's* departure from the *Solowy* standard will undermine the effectiveness of the statute of limitations protocol for medical malpractice litigation and will

[2] In finding that Defendants did not satisfy this burden in *Jendrusina*, the *Jendrusina* majority went beyond the record and conducted its own medical research, ultimately championing Plaintiff's position with arguments that Plaintiff had not himself raised. See Defendants-Appellants Application at 8, 29-35.

thwart the Legislature's tort reform intent to shorten the time within which such claims can be brought. For reasons more fully explained below, MSMS joins Defendants in urging this Court to grant the application for leave to appeal and to ultimately reverse the erroneous decision in *Jendrusina*.

STATEMENT OF FACTS AND PROCEEDINGS

Lacking an independent basis for reciting the facts, MSMS relies upon the Statement of Facts set forth in Defendants-Appellants' Application for Leave to Appeal.

ARGUMENT

I. This Court Should Grant Leave To Consider, And Ultimately Reverse, *Jendrusina's* Departure From The Discovery Standard Established By This Court In *Solowy v Oakwood Hosp*, Which Holds That Discovery Occurs When, On The Basis Of Objective Facts, A Plaintiff Discovers Or Should Have Discovered A Claim And Its Possible Cause.

This case involves the application of the medical malpractice discovery provision set forth in MCL 600.5838a(2), which provides that an action involving a claim for medical malpractice must be commenced within the time prescribed by certain specified limitations periods "or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later."[3]

---

[3] MCL 600.5838a, in pertinent part, states:

> (2) Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in sections 5805 or 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. However, the claim shall not be commenced later than 6 years after the date of the act or omission which is the basis for the claim. The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim

A. Grounds For Supreme Court Review And The Underlying Standard of Review.

The statute of limitations "discovery" analysis applied in *Jendrusina* involves principles of major significance to the state's jurisprudence, is clearly erroneous and will cause material injustice, and conflicts with other published appellate decisions, including this Court's decision in *Solowy*. In accordance with MCR 7.305(B)(3) and MCR 7.305(B)(5), the grounds for Supreme Court review are compelling.

The underlying issue, involving the grant or denial of a motion for summary disposition, is subject to de novo review. *Hill v Sears Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012). Questions of statutory interpretation are also reviewed de novo. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

B. Under *Solowy's* Possible Cause of Action Standard, Discovery Occurs When On The Basis Of Objective Facts, The Plaintiff Knows Of An Injury And Its Possible Cause.

In *Solowy v Oakwood Hosp*, 454 Mich 214; 561 NW2d 843 (1997), this Court was asked to decide whether the six-month discovery period in MCL 600.5838a(2) began to run when the plaintiff learned of two possible causes for the recurrence of a previously-removed lesion on her

---

> at least 6 months before the expiration of the period otherwise applicable to the claim shall be on the plaintiff. A medical malpractice action which is not commenced within the time prescribed by this subsection is barred. This subsection shall not apply, and the plaintiff shall be subject to the period of limitations set forth in subsection (3), under 1 or more of the following circumstances:
>
> (a) If discovery of the existence of the claim was prevented by the fraudulent conduct of a health care provider.
>
> (b) If a foreign object was wrongfully left in the body of the patient.
>
> (c) If the injury involves the reproductive system of the plaintiff.

ear, one potentially actionable and one not, or whether the discovery period began to run when her physician confirmed the potentially actionable diagnosis. *Id.* at 215. In answering this question, this Court adopted the "possible" cause of action standard that had been previously applied to a products liability claim in *Moll v Abbot Laboratories,* 444 Mich 1; 506 NW2d 816 (1993), and to a legal malpractice claim in *Gebhardt v O'Rourke*, 444 Mich 535; 510 NW2d 900 (1994). This Court described the standard as follows:

> The majority [in *Moll*] concluded that an objective standard applied in determining when a plaintiff should have discovered a claim. Further, the plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin. Rather, the discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action. [*Solowy*, 454 Mich at 222.]

Quoting *Moll*, *Solowy* reiterated that a "possible cause of action standard" properly balanced "the Court's concern regarding preservation of a plaintiff's claim when the plaintiff is unaware of an injury or its cause" and the "Legislature's concern for finality and encouraging a plaintiff to diligently pursue a cause of action." *Solowy*, 454 Mich at 222, quoting *Moll*, 444 Mich at 23-24. Finding the rationale equally applicable to medical malpractice claims, this Court concluded that "[o]nce a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Solowy*, 454 Mich at 222-223.[4] That occurred, this Court explained, when the plaintiff's doctor told her that

---

[4] This Court further explained:

> We see no need to further protect the rights of the plaintiff to pursue a claim, because the plaintiff at this point is equipped with sufficient information to protect the claim. This puts the plaintiff, whose situation at one time warranted the safe harbor of the discovery rule, on equal footing with other tort victims whose situation did not require the discovery rule's protection. [*Solowy*, 454 Mich at 222, quoting *Moll*, 444 Mich at 23-24.]

the lesion on her ear was either a recurrence of the cancer or seborrheic keratosis, and when she knew her symptoms were identical to those she had previously experienced. At this point, she knew of an injury (the progression of the lesion) and its possible cause (the defendants' failure to inform her that the cancer could recur and that she should seek follow-up treatment). This Court further explained:

> The "possible cause of action" standard does not require that the plaintiff know that the injury to her ear, in the form of the advancement of the disease process, was in fact or even likely caused by the defendant doctors' alleged omissions. Neither does the standard require that the plaintiff be aware of the full extent of her injury before the clock begins to run. Consequently, it is irrelevant that the plaintiff was not yet aware that the progression of cancer would eventually necessitate removal of the upper portion of her left outer ear. [*Id.* at 224-225.]

Although the "possible cause of action" standard requires less knowledge than a "likely cause of action" standard, it nonetheless requires a minimum level of information that, "when viewed in its totality, suggests a nexus between the injury and the negligent act." *Id.* at 226. The totality of information includes the plaintiff's "own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, and his physician's explanations of possible causes or diagnoses of his condition." *Id.* at 227.[5]

---

[5] *Solowy* rejected the assertion that the plaintiff was being held to a higher standard than her treating physician, who could not say for sure whether the lesion was cancer until receipt of confirmation. This Court explained:

> Here, even before the diagnosis was confirmed, Mrs. Solowy was aware that her symptoms were identical to those she experienced five years earlier. In her own words, "it started all over again." Consequently, her observations of the discomfort and of the appearance and condition of her ear should have aroused some suspicion in her mind that the lesion might be cancer. These observations, coupled with Dr. Laing's explanation that the basal cell carcinoma could recur and that the lesion could be a recurrence of this cancer, supplied Mrs. Solowy with enough information to satisfy the standard. [*Id.* at 227-228.]

Recognizing that the plaintiff proceeded with "some diligence in filing her claim, this Court emphasized that she nonetheless "sat" on her rights long enough to miss the statute of limitations, illustrating the "apparent arbitrariness" that is "the essential nature of any statute of limitations." "While we are sympathetic to those who miss the deadline by a few days," this Court expressed, "their claims are nevertheless barred." *Id.* at 225-226.

Solowy recognized that a delay in diagnosis might make causation difficult; but while the possible cause of action standard should be applied with flexibility, the standard must "nevertheless be maintained" so the purpose of the limitations period can be enforced:

> In summary, we caution that when the cause of a plaintiff's injury is difficult to determine because of a delay in diagnosis, the "possible cause of action" standard should be applied with a substantial degree of flexibility. In such a case, courts should be guided by the doctrine of reasonableness and the standard of due diligence and must consider the totality of information available to the plaintiff concerning the injury and its possible causes. *While the standard should be applied with flexibility, it should nevertheless be maintained so that the legitimate legislative purposes behind the rather stringent medical malpractice limitation provisions are honored.* [*Id.* at 230 (emphasis added).]

C. The *Jendrusina* Majority Departed From *Solowy* In Applying A Probable (Or Likely) Cause of Action Standard To Plaintiff's Discovery Of The Claim, Rather Than A Possible Cause of Action Standard.

The *Jendrusina* majority did not heed the instructions provided by this Court in *Solowy*. In *Jendrusina*, Plaintiff alleged that Dr. Mishra, his primary care physician, failed to refer him to a nephrologist "despite the fact that for several years plaintiff's blood tests [creatinine and eGFR] … demonstrated worsening and eventually irreversible kidney disease." 316 Mich App at 1. On January 3, 2011, Plaintiff went to the hospital with flu-like symptoms and was found to be in irreversible kidney failure. *Id.* He was thereafter placed on dialysis. *Id.* On September 20, 2012, Dr. Tayeb, a treating nephrologist, told Plaintiff his doctor should have sent him to a nephrologist years prior, which could have kept him from going into full kidney failure and dialysis. *Id.* Plaintiff contacted an attorney the next day and commenced suit within six months thereafter. *Id.*

Defendants moved for summary disposition based on the statute of limitations, which the trial court granted, concluding that Plaintiff should have discovered the existence of his claim when he was diagnosed with kidney failure in January 2011. *Id.*

On appeal, the *Jendrusina* majority reversed. Noting that the Legislature chose "should have" in the statutory language, which is "'used to indicate what is *probable*,'" rather than "could have, which is "'used to indicate *possibility*,'" (*id.*, quoting *New Oxford American Dictionary* (3rd ed) (emphasis in opinion)), the majority concluded:

> the inquiry is not whether it was *possible* for a reasonable lay person to have discovered the existence of the claim; the inquiry is whether it was *probable* that a reasonable lay person would have discovered the existence of the claim. [*Id.* at 2.]

The majority discussed, but distinguished, *Solowy* finding that the plaintiff there "neither required nor lacked special knowledge about the nature of the disease, its treatment, or its natural history."

> The question is whether a reasonable *person*, not a reasonable *physician*, would or should have understood that the onset of kidney failure meant that the person's general practitioner had likely committed medical malpractice by not diagnosing kidney disease.
>
> Indeed, defendants do not contend that a reasonable lay person understands the anatomy, physiology, or pathophysiology of kidneys. One would be hard-pressed to find a reasonable, ordinary person—who is not a medical professional—who knows what creatinine is or what an abnormal creatinine level means in addition to knowing how kidneys fail, why they fail, and how quickly they can fail. [*Id.* at 4 (emphasis in original).[6]]

The majority noted that it was "*possible*" for Plaintiff to have discovered the existence of a possible claim after being told he had kidney failure if he had undertaken "an extensive investigation to

---

[6] Describing Mrs. Solowy, the *Jendrusina* majority said: "She knew exactly what her relevant medical history was at all times. She simply delayed pursuing her claim in order to wait for final confirmation of what she already knew was very likely true. Moreover, the *Solowy* plaintiff had visible symptoms that were clearly recognizable as a likely recurrence of her skin cancer long before the ultimate diagnosis. In this case, however, plaintiff's first recognizable symptom, i.e., urine retention, did not occur until January 2011 when it precipitated his hospitalization." 316 Mich App at 4.

discover more information than he had." *Id.* at 5. However, the majority insisted that "there is no basis in statute, common law, or common sense to impute such a duty to people who become ill." *Id.* The majority continued:

> We agree that anytime someone receives a new diagnosis, worsened diagnosis, or worsened prognosis, that individual could consider whether the disease could or should have been discovered earlier. Moreover, diligent medical research and a review of the doctor's notes might reveal that an earlier diagnosis should have been made. That, however, is not the standard. We must determine what the plaintiff "should have discovered" on the basis of what he knew or was told, not on the basis of what his doctors knew or what can be found in specialized medical literature. Therefore, the elevated levels of creatinine in plaintiff's blood tests during prior years is of no moment given the absence of any evidence that plaintiff ever saw those reports or that he knew what the word "creatinine" meant, let alone the pathophysiology of kidney failure, its measures, its causes, its natural history, or its treatment. [*Id.*]

The majority opined that it would be highly disruptive of the physician-patient relationship if courts advise patients "that they 'should' consider every new diagnosis as evidence of possible malpractice until proven otherwise. Had the legislature intended such a result it would have use [sic] the phrase 'could have discovered,' not 'should have discovered.'" *Id.* at 6.

D. The *Jendrusina* Dissent Applied The Correct Rule And Reached The Correct Result.

As Judge Jansen explained in dissent, the *Jendrusina* majority did not apply the correct standard, omitted relevant facts, and reached the wrong result. Plaintiff knew Dr. Mishra was testing his kidney levels, believed the tests were connected to edema he began to experience in 2008, and was told in 2008 that his kidney test results, although a bit elevated, were not a cause for concern because his "kidney number" was under five. 316 Mich App at 6 (Jansen, J., dissenting). In 2009, Dr. Mishra conducted an ultrasound of Plaintiff's kidneys and told Plaintiff that his kidneys were "fine." *Id.* He did not tell Plaintiff that he had chronic renal failure. *Id.* On January 3, 2011, Plaintiff was diagnosed with acute end-stage renal failure and began regular

dialysis. *Id.* At that point, Judge Jansen concluded, Plaintiff should have discovered a possible claim:

> On January 3, 2011, when plaintiff became aware of this diagnosis that was so plainly contradictory to everything Dr. Mishra had said up until that point, he became "equipped with sufficient information to protect [his] claim." See *Moll*, 444 Mich at 24. Thus, the limitations period expired six months after this date. See *id.* [316 Mich App at 7 (Jansen, J., dissenting).]

Judge Jansen dispelled the notion that Plaintiff could not make the connection between the new diagnosis and Dr. Mishra's alleged negligence until his conversation with Dr. Tayeb more than 20 months later, explaining that this Supreme Court has stated that such a connection is unnecessary because "'[t]he "possible cause of action" standard does not require that the plaintiff know that the injury . . . was in fact or even likely caused by the [doctor's] alleged omissions.'" *Id.* at 8, quoting *Solowy*, 454 Mich at 224. Further, "'[a] plaintiff must act diligently to discover a possible cause of action and "cannot simply sit back and wait for others" to inform [him] of its existence.'" *Id.*, quoting *Turner v Mercy Hosp & Health Servs of Detroit*, 210 Mich App 345, 353; 533 NW2d 365 (1995).[7]

Disagreeing with the majority's conclusion that Plaintiff should not have known of a possible cause of action because he did not know that he had a progressive kidney disease, Judge Jansen explained:

---

[7] Other courts interpreting similar discovery rules have held that learning of the existence of a claim from others is not the act that triggers the discovery period. See, e.g., *Burden v Lucchese*, 173 Ohio App 3d 210, 219-220; 877 NE2d 1026 (2007) (holding that the plaintiff's claim began to accrue on the date of the patient's death and not when his attorney completed the investigation and determined that a cause of action existed); *Vannoy v Milum*, 171 SW3d 745, 748-749 (Ky Ct App 2005) (holding that one-year period of limitations began to run when the patient learned that there was vestibular damage and that the gentamicin therapy was at least part of the cause, not when the patient learned from his attorney that he had an actionable claim); *Strong v Univ of SC Sch of Med*, 316 SC 189, 191; 447 SE2d 850 (1994) (rejecting argument that discovery rule delayed running of statute of limitations until patient's attorney reviewed the medical records).

> First, the majority relies on evidence outside the record in concluding that kidney failure can occur quickly and has several causes. The majority conducted its own research regarding the pathophysiology of kidney failure and failed to limit its review to the medical evidence in the record. The parties did not discuss the causes or progression of kidney failure in their briefs on appeal, and the majority's discussion of the pathophysiology of kidney disease contains medical conclusions that require expert testimony and that are outside the expertise of the majority. Second, contrary to the majority's conclusion, plaintiff knew that he had elevated kidney test levels. He also knew that Dr. Mishra performed an ultrasound test on his kidneys, which would have alerted a reasonable person to the fact that there might be an issue with his or her kidneys. In spite of plaintiff's elevated kidney levels and the ultrasound test, Dr. Mishra informed plaintiff that his kidneys were fine and that there was nothing to worry about. [316 Mich App at 8.]

Judge Jansen properly concluded that Plaintiff should have known of a possible cause of action "when he learned that he had kidney disease, in spite of Dr. Mishra's statements to the contrary." Plaintiff knew "that Dr. Mishra was monitoring his kidneys and that he had elevated kidney levels," and "that Dr. Mishra performed an ultrasound test specifically to ensure that there was no issue with his kidneys." Therefore, he "should have known of a possible cause of action when he learned that he had kidney failure." *Id.*

Judge Jansen likewise rejected the majority's belief that a reasonable, ordinary person would have to understand medical terminology and the pathophysiology of kidney disease in order to have discovered a possible claim, stating:

> Dr. Mishra discussed the issue with plaintiff in terms that plaintiff could understand by informing plaintiff that his "kidney number" was a bit elevated, but informing him that he had nothing to worry about. Plaintiff's deposition testimony reveals that he understood that Dr. Mishra was monitoring his kidneys. Plaintiff was also aware that Dr. Mishra ordered an ultrasound test for his kidneys and that Dr. Mishra concluded that his kidneys were fine after looking at the test. Therefore, this was not a situation in which plaintiff was presented with information that he could not understand. Instead, plaintiff was aware that Dr. Mishra was monitoring his kidneys for a potential problem, but Dr. Mishra reassured him that there was no issue. [*Id.* at 9.]

E. *Jendrusina* Rewrites The *Solowy* Standard From Possible Claim To Probable/Likely Claim And Disregards The Standards of Reasonableness and Due Diligence.

Bearing the mark of what is hence forward obligatory precedent, *Jendrusina* cannot be reconciled with this Court's consistent adoption and explication of the "possible cause of action" standard across the spectrum of practice areas in *Moll*, *Gebhardt* and *Solowy*. *Jendrusina* is a blatant departure, creating a difficult dilemma for litigants and our courts, which may now apparently elect one formulation or the other, depending upon the preferred result. This is clearly contrary to the Legislature's intent.

1. The *Jendrusina* Majority Adopts The "Probable" or "Likely" Claim Standard Which Was Rejected By This Court in *Moll* and *Solowy*.

In *Solowy*, this Court adopted the "possible cause of action" standard, explicitly rejecting a standard which would have required plaintiff to know that the alleged negligence was a "likely" or "probable" cause of the injury. Describing the "possible claim" standard as applied in *Moll*, this Court explained that "the plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin." 454 Mich at 222. In the context of the *Solowy* facts, this Court again repeated that

> [t]he "possible cause of action" standard does not require that the plaintiff know that the injury to her ear, in the form of the advancement of the disease process, was in fact or even likely caused by the defendant doctors' alleged omissions. [*Id.* at 225.]

Jendrusina disregards *Moll* and *Solowy*, stating that "the inquiry is not whether it was *possible* for a reasonable lay person to have discovered the existence of the claim; the inquiry is whether it was *probable* that a reasonable lay person would have discovered the existence of the claim." 316 Mich App at 2 (emphasis added). This is just another way of saying that the claim must be "probable," rather than merely "possible," a formulation that extends the discovery period until causation can be shown with some certainty.

The *Jendrusina* majority alternatively speaks of the standard in terms of a "likely" claim, stating:

> The question is whether a reasonable *person*, not a reasonable *physician*, would or should have understood that the onset of kidney failure meant **that the person's general practitioner had <u>likely</u> committed medical malpractice** by not diagnosing kidney disease. [*Id.* at 4 (italicized emphasis in original; bold and underlined emphasis added)].

And also, in describing *Solowy*, stating:

> She [Mrs. Solowy] knew exactly what her relevant medical history was at all times. She simply delayed pursuing her claim in order to wait **for final confirmation of what she already knew was very <u>likely</u> true**. Moreover, the *Solowy* plaintiff had visible symptoms that were **clearly recognizable as a <u>likely</u> recurrence** of her skin cancer long before the ultimate diagnosis. [*Id.* at 4 (bold and underlined emphasis added)].

The *Jendrusina* majority's adoption of a "probable" and "likely" cause of action standard cannot be reconciled with this Court's explicit rejection of that level of certainty in *Solowy*:

> [T]he plaintiff **need not know for certain that he had a claim, or even know of a <u>likely</u> claim** before the six-month period would begin. [454 Mich at 222 (bold and underlined emphasis added)].

And,

> The "possible cause of action" standard **does not require that the plaintiff know that the injury to her ear, in the form of the advancement of the disease process, was in fact or even <u>likely</u> caused** by the defendant doctors' alleged omissions [454 Mich at 224-225 (bold and underlined emphasis added)].

Jendrusina unquestionably raises the discovery bar. As this Court explained in rejecting the "likely" cause of action standard in *Moll*, "a 'possible cause of action' generally will be discovered before a 'likely cause' of injury"; further, the likely cause of action standard "raises the level of certainty with respect to causation." 444 Mich at 21-22. Comparing the two terms, this Court explained:

> According to Black's Law Dictionary (6th ed.), p. 925, the term "likely" is defined as:

> "Probable. *Horning v Gerlach*, 139 Cal App 470 [471-473]; 34 P2d 504, 505 [1934]. In all probability *Neely v Chicago Great Western R Co*, 14 SW2d 972, 978 [Mo App, 1928]. Likely is a word of general usage and common understanding, broadly defined as of such nature or so circumstantial as to make something probable and having [sic] better chance of existing or occurring than not. *People v Randall*, 711 P2d 689, 692 [Colo, 1985]."
>
> The term "possible," on the other hand, connotes a lesser standard of information needed to provide knowledge of causation. Black's Law Dictionary defines the term "possible" as:
>
> > "Capable of existing, happening, being, becoming or coming to pass; feasible, not contrary to nature of things; neither necessitated nor precluded; free to happen or not; contrasted with impossible." *Id.* at 1166. [*Moll*, 444 Mich at 22.]

In *Moll*, this Court recognized that in determining the appropriate standard for the discovery rule, it was important to consider the policy reasons prompting adoption of the statute of limitations and the discovery rule, and to "choose the interpretation that best promotes both policies and does the least amount of damage to the respective principles of law." *Id.* at 22-23. The "likely cause of action" standard, this Court observed, "*wreaks havoc with the legislative policies underlying the statute of limitations*" (emphasis added).

> The statute of limitations encourages claimants to investigate and pursue causes of action. It alleviates defendants' continued fear of litigation following a legislatively mandated time period. A "likely cause" standard is inapposite to such policies. [*Id.* at 23 (footnotes omitted).]

Delaying discovery until the date Dr. Tayeb told Plaintiff that he should have been referred to a nephrologist who could have halted the progression of his disease harks back to the level of certainty that *Solowy* soundly rejected and requires sophisticated knowledge akin to medical expertise, contrary to this Court's prior pronouncement that discovery does not await the opinion of an expert relative to the existence of a claim. *Jendrusina*'s determination that discovery was not "possible" because Plaintiff's kidney failure might have been caused by an acute event belies

Solowy, which expressly held that discovery does not require exclusion of a possible benign cause when a potentially actionable cause is also possible.

2. The *Jendrusina* Majority Alters The Burden Of Proof And Fails To Enforce The Standards Of Reasonableness And Due Diligence.

Jendrusina also imposed upon Defendants the burden of showing that the claim was not discovered more than six months prior to commencing the action, despite the statutory allocation of that burden to Plaintiff. In conjunction therewith, the majority did away with the well-settled standard of reasonableness and with the requirement that a plaintiff exercise due diligence with respect to pursuit of his claim. The majority recognized that it was "possible" for Plaintiff to have discovered the existence of a possible claim once he learned that he was in kidney failure if he had sought more information but insisted he had no duty to do so. 316 Mich App at 5. This excuse of duty eliminates the requirement that a plaintiff act with due diligence. As Justice Boyle explained in *Moll*, "if there were evidence in the record … to suggest that plaintiff could have learned of defendant's responsibility had she exercised due diligence, summary judgment would be appropriate." 444 Mich at 32 (Boyle, J., concurring in part and dissenting in part). That clearly is the case here as the *Jendrusina* majority itself admits, stating: "We agree that anytime someone receives a new diagnosis, worsened diagnosis, or worsened prognosis, that individual could consider whether the disease could or should have been discovered earlier. *Moreover, diligent medical research and a review of the doctor's notes might reveal that an earlier diagnosis should have been made.*" 316 Mich App at 5 (emphasis added).]

Due diligence has been part and parcel of the discovery rule since its common law inception. The common-law discovery rule was adopted in the malpractice context in *Johnson v Caldwell*, 371 Mich 368, 379; 123 NW2d 785 (1963), which stated that "[t]he limitation statute or statutes in malpractice cases do not start to run until the date of discovery, or the date when, *by the*

exercise of reasonable care, plaintiff should have discovered the wrongful act." (Emphasis added). Subsequently, Michigan courts used "reasonable care" and "reasonable diligence" interchangeably. See, e.g., *Dyke v Richard*, 390 Mich 739, 747; 213 NW2d 185 (1973) ("[A]n action based on malpractice by a state licensed person must be brought . . . within two years of the time when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the asserted malpractice. . . ."); see also *Moll*, 444 Mich at 16 (stating that under the discovery rule, a plaintiff's claim for personal injury accrues when "the plaintiff discovers, or through the exercise of reasonable diligence, should have discovered," the elements of such cause of action); Indeed, without the requirement of due diligence, the discovery rule has no teeth and cannot be enforced.

Further, in reaching its result, the *Jendrusina* majority clearly focused on what the Plaintiff knew, rather than what the Plaintiff should have known. This Court rejected the adoption of a subjective test in *Moll* stating:

> Certainly, adoption of a subjective test would give a plaintiff a greater opportunity to bring suit against an alleged wrongdoer. But this approach would also vitiate the statute of limitations as a defense. In enacting the three-year statute of limitations, the Legislature has provided a time limitation that in its judgment gives a plaintiff a reasonable opportunity to investigate a cause of action. This Court has recognized specific situations in which the discovery rule must be utilized to prevent unjust results ... While we have provided judicial relief to plaintiffs whose actions would be barred by the statute of limitations through no fault of their own, *id.*, we will not encourage and cannot allow a plaintiff to sleep on an objectively known cause of action. [444 Mich at 16-18 (footnotes omitted).]

Contrary to the *Jendrusina* majority opinion, notice of a claim cannot await a subjective belief in the linkage between injury and cause in fact. Delaying operation of the discovery rule until a plaintiff has definitive knowledge of a causal link undermines the objective standard imposed by the Legislature.

RELIEF REQUESTED

For the reasons expressed above and in Defendants-Appellants' Application for Leave to Appeal, Amicus Curiae Michigan State Medical Society respectfully requests that this Court grant leave to appeal and ultimately reverse the erroneous decision in *Jendrusina*.

Dated: April 5, 2017

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

By: /s/Jacquelyn A. Klima

Joanne Geha Swanson (P33594)
Jacquelyn A. Klima (P69403)
Attorneys for Amicus Curiae
Michigan State Medical Society
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200; FAX (313) 961-0388
E-mail: jswanson@kerr-russell.com
Email: jklima@kerr-russell.com

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2016, I caused Michigan State Medical Society's Motion for Leave to File Amicus Brief in Support of Defendants-Appellants' Application for Leave to Appeal, Michigan State Medical Society's Amicus Brief in Support of Defendants-Appellants' Application for Leave to Appeal, and this Certificate of Service to be electronically filed with the Clerk of the Court using the Court's electronic filing system which will electronically serve all attorneys of record.

By: /s/Jacquelyn A. Klima
Jacquelyn A. Klima (P69403)

EXHIBIT A

316 Mich.App. 621
Court of Appeals of Michigan.

JENDRUSINA
v.
MISHRA.

Docket No. 325133.
|
Submitted Feb. 10, 2016, at Detroit.
|
Decided Aug. 4, 2016, at 9:00 a.m.

Synopsis

Background: Patient filed medical malpractice action against internist, who was his primary care physician. The Circuit Court, Macomb County, James M. Biernat, Jr., J., granted summary disposition in favor of internist. Patient appealed.

Holdings: The Court of Appeals, Shapiro, J., held that:

[1] six-month discovery rule limitations period began running when patient was seen by nephrologist, as that was when he should have discovered possible malpractice action, and

[2] patient's affidavit regarding statements nephrologist had made was not inadmissible hearsay in proceedings on timeliness of malpractice claim.

Reversed and remanded.

Jansen, J., filed dissenting opinion.

Attorneys and Law Firms

McKeen & Associates, PC (by Brian J. McKeen and John R. LaParl, Jr.), and Bendure & Thomas, PLC (by Mark R. Bendure), for Kerry Jendrusina.

Plunkett Cooney PC (by Karen E. Beach) for Shyam Mishra, M.D., and Shyam Mishra, M.D., PC.

Before: GLEICHER, P.J., and JANSEN and SHAPIRO, JJ.

Opinion of the Court

SHAPIRO, J.

***1** Plaintiff, Kerry Jendrusina, filed this medical malpractice case against his primary care providers, Dr. Shyam Mishra, a specialist in internal medicine, and Shyam N. Mishra, M.D., PC. Defendants moved for summary disposition, asserting that plaintiff's notice of intent to sue, and therefore the complaint, had not been timely filed. Plaintiff responded that the claim had been initiated within the six-month discovery period defined by the Legislature in MCL 600 .5838a. That statute provides in pertinent part, "[A]n action involving a claim based on medical malpractice may be commenced ... within 6 months after the plaintiff discovers or *should have* discovered the existence of the claim...." MCL 600.5838a(2) (emphasis added). The trial court granted defendants' motion,

finding that the claim was not timely. In so ruling, the trial court effectively substituted the phrase "*could have* " for "*should have* " in the statute. Because we are to follow the text of the statute as written, we reverse and remand.

On January 3, 2011, plaintiff went to the hospital with flu-like symptoms. He was found to be dehydrated, and, after performing various tests, the hospital staff determined that plaintiff was in irreversible kidney failure. As a result, plaintiff was placed on lifetime dialysis with its attendant morbidity and mortality.

Plaintiff asserts that defendants failed to take action as required by the relevant standard of care, such as a referral to a nephrologist (kidney specialist), despite the fact that for several years plaintiff's blood tests—contained within plaintiff's medical chart maintained by Mishra—demonstrated worsening and eventually irreversible kidney disease. Plaintiff further asserts that had Mishra complied with the standard of care, plaintiff's irreversible kidney failure would have been avoided.

[1] According to plaintiff, he did not discover the existence of his claim until September 20, 2012. On that date, plaintiff was seen by Dr. Jukaku Tayeb, a treating nephrologist. According to plaintiff's testimony:

> [Tayeb] came in and what it was, he got full biopsy, not just a short version out of Clinton Henry Ford, out of Detroit. He got that and read through it and reviewed the case and talked to the pathologist, I guess, and he goes, "I got your full pathology report here," and he goes, "Did your doctor—Why didn't you come to a nephrologist?" I said I was with an internist. The internist said everything was fine.... Then he started ranting, saying, "The doctor should have sent you. I could have kept you off of dialysis. You should have came [sic] here years ago. I could have prevented you from being on dialysis and you going into full kidney failure, if you would have came [sic] to a nephrologist early on."

Plaintiff testified that when Tayeb told him this, he "was shocked. I was dumbfounded. That was like someone punching me in the gut." He testified that before that conversation with Tayeb, he did not know his kidney failure had developed over years and could have been avoided with an earlier referral and treatment. He testified that until then, "I thought it happens, it happens." He testified that immediately after this visit with Tayeb, he called his wife and said, "Oh, my God. I think Mishra screwed up." The following day, plaintiff contacted an attorney. Calculating the six-month discovery period from September 20, 2012, plaintiff timely initiated this case. The trial court concluded, however, that plaintiff should have discovered the existence of his claim when he was diagnosed with kidney failure in January 2011.

***2** [2] In reviewing the trial court's analysis, we must be strictly guided by the language of the statute. "If the language of a statute is clear and unambiguous, this Court must enforce the statute as written." *People v.*

Dowdy, 489 Mich. 373, 379, 802 N.W.2d 239 (2011).

> Our function in construing statutory language is to effectuate the Legislature's intent. Plain and clear language is the best indicator of that intent, and such statutory language must be enforced as written. [*Velez v. Tuma*, 492 Mich. 1, 16–17, 821 N.W.2d 432 (2012) (citations omitted).]

Significantly, we note that the Legislature chose the phrase "should have" rather than "could have" in the statutory text. According to the *New Oxford American Dictionary* (3d ed), "could" is "used to indicate *possibility* " whereas "should" is "used to indicate what is —*probable.*" (Emphasis added.) [1] Therefore, the inquiry is not whether it was *possible* for a reasonable lay person to have discovered the existence of the claim; rather, the inquiry is whether it was *probable* that a reasonable lay person would have discovered the existence of the claim.

Plaintiff's medical chart maintained by Mishra includes the results of his routine blood tests. Beginning in 2007, lab reports filed within the chart consistently contained abnormal and worsening levels of two blood measures related to kidney function: *creatinine* [2] and *eGFR*. [3]

While these test results are clearly relevant to the issue of whether Mishra complied with the standard of care, they are not relevant to the issue of when plaintiff should have discovered his potential claim unless there is evidence that plaintiff was made aware of the repeated and increasingly abnormal indications of kidney disease. Defendants offer no evidence that this was the case. First, it is undisputed that defendants' office never provided plaintiff with copies of his lab reports. Second, plaintiff testified that defendants never told him that he had kidney disease or that he might develop kidney disease. Indeed, given defendants' failure to introduce contrary evidence, defendants have not even created a question of fact on the issue. [4]

Defendants point out that in a 2008 office note, Mishra wrote down a diagnosis of "chronic renal failure." However, the note contains no reference to a discussion of this with the patient, i.e., plaintiff, and plaintiff testified that no such discussion ever occurred. Specifically, plaintiff testified as follows:

> *Q.* ... I'm looking at your records from Dr. Mishra's [office], December 22nd, 2008, so this would have been a few days before Christmas at the end of 2008. Dr. Mishra had diagnosed you with chronic renal failure; do you remember that?
>
> *A.* No, he never told me that.
>
> *Q.* You don't remember having any discussion with him about that then?
>
> *A.* No, not at all.

Q. You had swelling in your legs at that time. Do you remember that?

***3** *A.* Yes. He said it was because of my weight problem.

Q. So you don't remember any discussion December 2008 about having chronic renal failure?

[Objection omitted.]

A. No.

Q. When is the first time you recall having a discussion with Dr. Mishra about kidney failure?

A. He never discussed it with me.

Defendants have not submitted any evidence indicating that, contrary to plaintiff's testimony, Mishra discussed this diagnosis with plaintiff. As noted, the office chart does not indicate that the diagnosis was relayed or discussed with the patient, and it is undisputed that plaintiff neither saw nor had copies of those records until after he retained an attorney immediately following his September 20, 2012 conversation with Tayeb.[5]

In *Solowy v. Oakwood Hosp. Corp.*, 454 Mich. 214, 221–222, 561 N.W.2d 843 (1997), our Supreme Court held that what the claimant discovered or should have discovered is "a possible cause of action ." This point was critical in *Solowy* because the plaintiff in that case did not dispute that she knew her doctor might have committed malpractice. *Id.* at 225, 561 N.W.2d 843. Instead, she argued that the six-month time frame was not triggered until she had, in her own mind, confirmed that this was the case. *Id.* at 218–219, 561 N.W.2d 843. The facts of *Solowy* merit description. In 1986, the plaintiff had skin cancer on her ear. *Id.* at 216, 561 N.W.2d 843. The defendant excised it, and, according to the plaintiff, he told her in the same year that the cancer was "gone." *Id.* at 216–217, 561 N.W.2d 843. Then in 1992, the plaintiff discovered a similar lesion on her ear at the same site, but she took no action for some time because of the defendant's assurance that the cancer was gone. *Id.* at 217–218, 561 N.W.2d 843. Eventually she went to a new doctor who advised that the new lesion was either a recurrence of the prior cancer or a benign lesion. *Id.* at 217, 561 N.W.2d 843. A biopsy showed that it was a recurrence, and the plaintiff claimed that a more invasive surgery was required as a result of the defendant's incorrect assurance to her that the cancer was gone. *Id.* at 217–218, 561 N.W.2d 843. The plaintiff filed suit less than six months from the date of the biopsy but more than six months from the date the second doctor told her that the lesion might be a recurrence of her cancer. *Id.* at 218, 561 N.W.2d 843.

The plaintiff argued that even though she knew that she had a *possible* cause of action after being so advised, it was only after the biopsy that she knew or should have known that she had an *actual* cause of action. *Id.* at 224–225, 561 N.W.2d 843. She argued that, had the biopsy been benign, she would have learned that her possible cause of action was, in fact, not a cause of action. *Id.* The *Solowy* Court concluded that the discovery date is

when the plaintiff learns of a "possible cause of action" rather than learning of a "certain" cause of action. *Id.* at 221–222, 561 N.W.2d 843. However, the *Solowy* Court continued to apply the "should have" standard, stating:

> ***4** [T]he discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action. [*Id.* at 222, 561 N.W.2d 843.]

In *Solowy,* the time began to run when the plaintiff learned that there was a significant chance—in *Solowy* it was 50/50—that her doctor had committed malpractice. She knew that if her diagnosis was skin cancer, then she had grounds to file suit because she had previously had skin cancer at that location, it had been treated, and her doctor told her that it was "gone." *Id.* at 217, 224, 561 N.W.2d 843.

In the instant case, the record does not support the view that, when diagnosed with kidney failure, plaintiff "should have known of a possible cause of action." *Id.* at 222, 561 N.W.2d 843. As far as he knew, he had no previous history of kidney disease and did not know of the lab reports showing that his kidney failure was the result of a slowly progressing condition rather than an acute event. In *Solowy,* the plaintiff knew that her doctor might have committed malpractice as soon as the tumor grew back; she was only waiting to learn whether she was in fact injured as a result of his actions. In this case, the opposite is true; after diagnosis in January 2011, plaintiff knew he was sick, but he lacked the relevant data about his worsening lab reports and the medical knowledge to know that his doctor might have committed malpractice. The critical difference between plaintiff in this case and the plaintiff in *Solowy* is that the plaintiff in *Solowy* neither required nor lacked special knowledge about the nature of the disease, its treatment, or its natural history. [6] She knew exactly what her relevant medical history was at all times. She simply delayed pursuing her claim in order to wait for final confirmation of what she already knew was very likely true. Moreover, the *Solowy* plaintiff had visible symptoms that were clearly recognizable as a likely recurrence of her skin cancer long before the ultimate diagnosis. In this case, however, plaintiff's first recognizable symptom, i.e., urine retention, did not occur until January 2011 when it precipitated his hospitalization.

[3] **[4]** "[T]he discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action." *Id.* at 222, 561 N.W.2d 843. An objective standard, however, turns on what a reasonable, ordinary person would know, not what a reasonable physician (or medical malpractice attorney) would know. Therefore, the question is whether a reasonable *person,* not a reasonable *physician,* would or should have understood that the onset of kidney failure meant that the person's general practitioner had likely committed medical malpractice by not diagnosing kidney disease.

Indeed, defendants do not contend that a reasonable lay person understands the

anatomy, physiology, or pathophysiology of kidneys. One would be hard-pressed to find a reasonable, ordinary person—who is not a medical professional—who knows what creatinine is or what an abnormal creatinine level means in addition to knowing how kidneys fail, why they fail, and how quickly they can fail. [7]

***5** Moreover, plaintiff did not visit Mishra specifically for kidney problems. He saw him as a primary care provider for over 20 years. Unlike the plaintiff in *Solowy,* plaintiff never had surgery or even any treatment for the relevant organ or condition. He had routine complete blood counts and metabolic lab work done, as does virtually every patient who undergoes annual physicals. There is no evidence that he ever saw the blood test reports that showed the normal reference ranges, which would have revealed that his creatinine levels were high, or that he was ever advised of the relationship between creatinine levels and kidney disease. Defendants suggest that because Mishra once ordered a kidney ultrasound for plaintiff after an episode of edema and one slightly elevated lab report in 2008, plaintiff should have realized upon diagnosis of kidney failure that he had kidney disease back in 2008. However, the ultrasound was reported as normal. [8] Assuming that a reasonable, ordinary person would even recall a normal ultrasound performed years earlier, there is no reason that such a person would consider a *normal* ultrasound result as evidence that Mishra was simultaneously committing malpractice in some manner. Rather, the normal ultrasound rationally supported that Mishra had made no errors at all. The mere *performance* of a noninvasive, commonly administered kidney-imaging study that yielded a normal result does not constitute an "objective fact" from which plaintiff should have surmised that he had a possible cause of action when later diagnosed with kidney failure. See *Solowy,* 454 Mich. at 222, 561 N.W.2d 843.

It was *possible* for plaintiff to have discovered the existence of a possible claim shortly after presenting to the hospital and being told that he had kidney failure. To have done so, however, he would have had to have undertaken an extensive investigation to discover more information than he had. Presumably, plaintiff could have (1) studied the various causes and speeds of progression of kidney disease, (2) requested copies of his previous years' blood test reports, and (3) considered whether there were signs of progressive kidney disease in those reports. However, there is no basis in statute, common law, or common sense to impute such a duty to people who become ill.

[5] Defendants seem to suggest that the diagnosis of any serious illness in and of itself suffices to place on a reasonable person the burden of discovering a potential claim against a primary care physician if at any time in the past the physician *tested* an organ involved in a later diagnosis and reported normal results. [9] Certainly any new diagnosis or worsened diagnosis or worsened prognosis is an "objective fact," but it is a substantial leap to conclude that this fact alone *should* lead any reasonable person to *know* of a possible cause of action. We agree that anytime someone receives a new

diagnosis, worsened diagnosis, or worsened prognosis, that individual *could* consider whether the disease could or should have been discovered earlier. Moreover, diligent medical research and a review of the doctor's notes might reveal that an earlier diagnosis should have been made. That, however, is not the standard. We must determine what the plaintiff "should have discovered" on the basis of what he knew or was told, not on the basis of what his doctors knew or what can be found in specialized medical literature. Therefore, the elevated levels of creatinine in plaintiff's blood tests during prior years is of no moment given the absence of any evidence that plaintiff ever saw those reports or that he knew what the word "creatinine" meant, let alone the pathophysiology of kidney failure, its measures, its causes, its natural history, or its treatment. [10]

***6** To hold as defendants suggest would not merely be inconsistent with the text of the statute, but it would also be highly disruptive to the doctor-patient relationship for courts to advise patients that they "should" consider every new diagnosis as evidence of possible malpractice until proven otherwise. Had the Legislature intended such a result, it would have used the phrase "could have discovered," not "should have discovered."

[6] On the present facts, defendants have demonstrated that before the September 20, 2012 meeting with Tayeb, plaintiff *could* have discovered that he had a possible cause of action for malpractice. However, the statute triggers the six-month discovery period only when plaintiff *should* have discovered that he had a possible cause of action. Given the plain language of the statute, the trial court erred by granting defendants' motion for summary disposition. [11]

Reversed and remanded for further proceedings. We do not retain jurisdiction.

GLEICHER, P.J., concurred with SHAPIRO, J.

JANSEN, J. (dissenting).

***6** I respectfully dissent because I believe that the limitations period began to run when plaintiff learned that he had kidney failure in January 2011. Accordingly, I would affirm the trial court's order granting summary disposition in favor of defendants.

In 1988, defendant Dr. Shyam Mishra began treating plaintiff as his primary care physician. According to plaintiff's complaint, Dr. Mishra diagnosed him with renal insufficiency in 2007. The evidence presented by the parties establishes that Dr. Mishra began regularly testing plaintiff's kidneys at least as early as 2007. The tests continued on a regular basis. According to plaintiff, Dr. Mishra did not always communicate with plaintiff regarding his test results. Plaintiff testified that he did not know why Dr. Mishra was testing his kidneys, but he did know that Dr. Mishra was testing his kidney levels. He believed that the tests were connected with the edema he began to experience in 2008. He explained, "I didn't hear until the leg started swelling they

were monitoring something for kidneys." Plaintiff testified that Dr. Mishra never informed him that he suffered from kidney failure or that he should see a nephrologist.

Plaintiff testified in his deposition that Dr. Mishra told him in 2008 that his kidney test results were not a cause for concern and that, although his kidney levels were a bit elevated, there was nothing to worry about because his "kidney number" was under five. In 2009, Dr. Mishra conducted an ultrasound of plaintiff's kidneys and told plaintiff that his kidneys were "fine." He did not tell plaintiff that plaintiff had chronic renal failure. On January 3, 2011, plaintiff reported to the hospital with flu-like symptoms. The emergency room doctors found that plaintiff was in kidney failure and diagnosed him with acute end-stage renal failure. Plaintiff began regular dialysis. More than 20 months later, on September 20, 2012, plaintiff had a conversation with Dr. Jukaku Tayeb, a nephrologist. Plaintiff testified that, during that conversation, Dr. Tayeb told him that he should have been sent to a nephrologist in 2008. Plaintiff testified that Dr. Tayeb stated:

> *7 "The doctor should have sent you. I could have kept you off of dialysis. You should have came [sic] here years ago. I could have prevented you from being on dialysis and you going into full kidney failure, if you would have came [sic] to a nephrologist early on."

Following that conversation, on March 18, 2013, plaintiff provided Dr. Mishra and Dr. Mishra's practice with a notice of intent to sue. The present case was then filed on September 17, 2013. Relevant to this appeal, defendants moved for summary disposition pursuant to MCR 2.116(C)(7) and (10), arguing that the claim was time-barred under the statute of limitations. The trial court agreed with defendants and concluded that plaintiff should have discovered his claim on January 3, 2011. Therefore, the trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(7), finding that plaintiff's claim was barred by the statute of limitations.

I respectfully disagree with the majority's conclusion that plaintiff should not have discovered his claim until he talked with Dr. Tayeb on September 20, 2012. It is undisputed that plaintiff's complaint fell outside the general two-year period of limitations set forth in MCL 600.5805(6). Instead, plaintiff asserts that the alternate six-month "discovery rule" period of limitations set forth in MCL 600.5838a(2) should apply to his claims. The Michigan Supreme Court in *Solowy v. Oakwood Hosp. Corp.*, 454 Mich. 214, 222, 561 N.W.2d 843 (1997), explained that "the plaintiff need not know for certain that he had a claim, or even know of a likely claim before the six-month period would begin." Instead, the plaintiff merely needs to know of a *possible* cause of action. *Id.* The rule does not require a plaintiff to be able to prove every element of a cause of action in order for the limitations period to begin running. *Id.* at 224, 561 N.W.2d

843. The Court explained, "In applying this flexible approach, courts should consider the totality of information available to the plaintiff, including his own observations of physical discomfort and appearance, his familiarity with the condition through past experience or otherwise, and his physician's explanations of possible causes or diagnoses of his condition." *Id.* at 227, 561 N.W.2d 843. Our Supreme Court has also explained that "[t]he discovery rule applies to the discovery of an injury, not to the discovery of a later realized consequence of the injury." *Moll v. Abbott Laboratories,* 444 Mich. 1, 18, 506 N.W.2d 816 (1993). Additionally, "[t]his Court has held that the discovery rule does not act to hold a matter in abeyance indefinitely while a plaintiff seeks professional assistance to determine the existence of a claim." *Turner v. Mercy Hosps. & Health Servs. of Detroit,* 210 Mich.App. 345, 353, 533 N.W.2d 365 (1995).

Plaintiff admits that he was aware that Dr. Mishra was testing his kidneys and that Dr. Mishra never said anything was wrong. He testified in his deposition that in 2008, Dr. Mishra told him that his "kidneys [were] a little bit elevated but not to the point where there was anything to worry about...." In 2009, Dr. Mishra ordered an ultrasound test for plaintiff's kidneys, and Dr. Mishra informed plaintiff that the ultrasound indicated that plaintiff's kidneys were "fine." On January 3, 2011, when plaintiff became aware of this diagnosis that was so plainly contradictory to everything Dr. Mishra had said up until that point, he became "equipped with sufficient information to protect [his] claim." See *Moll,* 444 Mich. at 24, 506 N.W.2d 816. Therefore, the limitations period expired six months after this date. See *id.*

***8** Plaintiff argues that he was not able to make the connection between the new diagnosis and Dr. Mishra's alleged negligence until September 20, 2012. The Michigan Supreme Court has stated, however, that this connection is not necessary: "The 'possible cause of action' standard does not require that the plaintiff know that the injury ... was in fact or even likely caused by the [doctor's] alleged omissions." *Solowy,* 454 Mich. at 224, 561 N.W.2d 843. Further, this Court has previously held that "[a] plaintiff must act diligently to discover a possible cause of action and 'cannot simply sit back and wait for others' to inform [him] of its existence." *Turner,* 210 Mich.App. at 353, 533 N.W.2d 365 (citation omitted). Considering this, it is plain that plaintiff should have discovered his potential claim on January 3, 2011. Therefore, the period of limitations in MCL 600.5838a(2) expired six months after January 3, 2011. Plaintiff's notice of intent was delivered on March 18, 2013, which was well after the six-month limitations period expired.

The majority concludes that defendants failed to demonstrate that plaintiff should have known that he had a possible cause of action for malpractice when he was hospitalized in January 2011. The majority points to the fact that Dr. Mishra did not inform plaintiff that he had kidney disease and that plaintiff did not have access to his records or lab reports. The majority

reasons that plaintiff did not know he had a previous history of kidney disease and was unaware that his kidney disease was a slowly progressing condition, rather than an acute incident.

I disagree with the majority's conclusion that the fact that plaintiff was unaware that he had a progressive kidney disease demonstrates that he should not have known of a possible cause of action. First, the majority relies on evidence outside the record in concluding that kidney failure can occur quickly and has several causes. The majority conducted its own research regarding the pathophysiology of kidney failure and failed to limit its review to the medical evidence in the record. The parties did not discuss the causes or progression of kidney failure in their briefs on appeal, and the majority's discussion of the pathophysiology of kidney disease contains medical conclusions that require expert testimony and that are outside the expertise of the majority. Second, contrary to the majority's conclusion, plaintiff knew that he had elevated kidney test levels. He also knew that Dr. Mishra performed an ultrasound test on his kidneys, which would have alerted a reasonable person to the fact that there might be an issue with his or her kidneys. In spite of plaintiff's elevated kidney levels and the ultrasound test, Dr. Mishra informed plaintiff that his kidneys were fine and that there was nothing to worry about. Plaintiff should have known that he had a possible cause of action when he learned that he had kidney disease, in spite of Dr. Mishra's statements to the contrary. Plaintiff's kidney failure was not a sudden event disconnected to his previous medical diagnoses and treatment. Instead, plaintiff was aware of the fact that Dr. Mishra was monitoring his kidneys and that he had elevated kidney levels, and plaintiff knew that Dr. Mishra performed an ultrasound test specifically to ensure that there was no issue with his kidneys. Therefore, plaintiff should have known of a possible cause of action when he learned that he had kidney failure on January 3, 2011.

***9** The majority also reasons that a reasonable, ordinary person would not understand the medical terminology or the pathophysiology connected with kidney diseases. However, plaintiff's understanding of the terminology and physiology of his condition was not necessary in order for him to know of a possible cause of action. Indeed, Dr. Mishra discussed the issue with plaintiff in terms that plaintiff could understand by informing plaintiff that his "kidney number" was a bit elevated, but informing him that he had nothing to worry about. Plaintiff's deposition testimony reveals that he understood that Dr. Mishra was monitoring his kidneys. Plaintiff was also aware that Dr. Mishra ordered an ultrasound test for his kidneys and that Dr. Mishra concluded that his kidneys were fine after looking at the test. Therefore, this was not a situation in which plaintiff was presented with information that he could not understand. Instead, plaintiff was aware that Dr. Mishra was monitoring his kidneys for a potential problem, but Dr. Mishra reassured him that there was no issue.

Plaintiff's testimony indicated that he had actual knowledge of the existence of his claim once Dr. Tayeb informed him that he could have avoided kidney failure if his physician referred him to a nephrologist earlier. However, MCL 600.5838a(2) requires the court to consider when a plaintiff discovered or *should have* discovered the existence of his claim. Plaintiff should have discovered the existence of a cause of action on January 3, 2011, and he failed to commence the action within six months of this date. Accordingly, I conclude that plaintiff's action was barred by the limitations period in MCL 600.5838a(2), and summary disposition was properly granted pursuant to MCR 2.116(C)(7). Therefore, I would affirm the trial court's order granting summary disposition in favor of defendants.

1 Other dictionaries provide consistent definitions. *Merriam–Webster's Collegiate Dictionary* (11th ed) defines "could" as "an alternative to *can* suggesting less force or certainty" and "should" as "used in auxiliary function to express obligation." *Random House Webster's College Dictionary* (2d ed) defines "could" as "used to express conditional possibility or ability" and "should" as "used to indicate duty, propriety, or expediency."

2 Creatinine is a waste product of muscle metabolism that is normally filtered out by the kidneys and discharged in urine. Standard blood test panels include a measure of creatinine in the blood. According to the record before us, normal blood levels of creatinine are in the range of 0.5 to 1.3 milligrams per deciliter of blood (mg/dL). If creatinine levels go above that range, the elevated levels suggest that the kidneys are not adequately filtering creatinine, which may be a sign of kidney failure. According to Dr. Mishra's records, plaintiff's creatinine level in 2007 was 1.5 mg/dL. Over the next several years, plaintiff's creatinine level, according to Dr. Mishra's chart, grew increasingly elevated until it reached 4.99 mg/dL by the end of 2010.

3 The lab measure known as eGFR refers to "estimated glomerular filtration rate" and should normally be greater than 60 milliliters of blood per minute (mL/min/1.73m ^{2}). Beginning in 2007, plaintiff's level fell below 60 mL/min/1.73m ^{2} and continued to decrease over the next five years until it was measured at 12 mL/min/1.73m ^{2} in 2011.

4 Even if there were a question of fact, it should be resolved by the jury, not by the trial court on a motion for summary disposition. See *Kincaid v. Cardwell*, 300 Mich.App. 513, 523, 834 N.W.2d 122 (2013).

5 In addition, despite the fact that defendants obtained an order to conduct ex parte meetings with plaintiff's physicians, the record contains no testimony or affidavits from any of these physicians indicating that before the September 20, 2012 conversation with Tayeb, they advised plaintiff that his kidney disease could or should have been recognized and treated years earlier by Mishra.

6 "Natural history" is a medical term meaning the expected course of a disease absent treatment. See *Merriam–Webster's Collegiate Dictionary* (11th ed). For example, whether kidney failure can occur suddenly or only over an extended period of time requires knowledge of the "natural history" of kidney disease.

7 Our dissenting colleague suggests that any reasonable person would know that kidney failure must develop over a long period. She offers no grounds for such a conclusion. Moreover, her assertion is inconsistent with medical knowledge. Kidney failure can occur very quickly and has several possible causes, such as reduction in blood flow, allergic reaction, infection, adverse reaction to medication, dehydration, kidney stones, cancer, nerve damage, and others. See Mayo Clinic, *Acute Kidney Failure: Causes* << http://www.mayoclinic.org/ diseases-conditions/kidney-failure/basics/ causes/con–20024029>> (accessed April 28, 2016) [https://perma.cc/5MPK-RZBP]. And contrary to the dissent's claim, we do not cite this medical text to justify plaintiff's belief; we do so to refute the dissent's claim that plaintiff's belief was inconsistent with science and therefore unreasonable.

8 The dissent suggests that plaintiff was told by Mishra that his blood tests were being done specifically due to concern about his kidneys and that after each test, Mishra assured plaintiff that his kidneys were fine. However, this suggestion is not consistent with the record. As already noted, plaintiff testified that he was

told only once, in late 2008, that his "kidney number" on a single blood test was a little high and that he was correctly advised that his follow-up ultrasound was normal. There is *no* testimony that Mishra thereafter discussed plaintiff's kidney health with him except in notifying him that his annual blood tests, which included many non-kidney tests, were normal. The dissent's characterization of these communications as revealing to plaintiff that he had "elevated kidney levels" (i.e., plural) is inaccurate. (Emphasis added.) There is a substantial and striking difference between a single conversation three years before diagnosis and a subject of repeated discussion. Therefore, contrary to the dissent's argument, the 2012 diagnosis was not "plainly contradictory to everything Dr. Mishra had said up until that point." Mishra likely told plaintiff many things between 2008 and 2012. Regarding plaintiff's kidneys, there were but two conversations: one in 2008 referring to a mildly elevated test, and the accurate report of a normal kidney ultrasound in early 2009.

9 The discovery rule does not incorporate the logical fallacy of *post hoc, ergo propter hoc* (after this, therefore because of this).

10 Although plaintiff's kidney disease was diagnosed after he had undergone tests for kidney disease (among many other tests), it simply does not follow that the tests were related to his disease. More information was required to make that link, and that information was supplied by Tayeb.

11 Plaintiff also challenges another ruling which we agree was erroneous. However, in light of our ruling, the issue appears to be moot. Before being deposed, plaintiff provided an affidavit to the trial court, averring, as he later did in his deposition, that he had spoken with Tayeb on September 20, 2012, and that, on that date, Tayeb informed him that had he been referred to a nephrologist earlier, he may have delayed or avoided his current state of renal failure and dialysis. More specifically, plaintiff averred that Tayeb stated that defendants' failure to refer plaintiff to a nephrologist was inappropriate and was a serious contributor to plaintiff's medical condition. Plaintiff presented this affidavit in his brief addressing the timeliness of his claim. The trial court refused to consider the affidavit on the grounds that it was inadmissible hearsay. This ruling was erroneous as matter of law given that the affidavit was not offered for the truth of the matter asserted by the declarant. See *People v. Eggleston*, 148 Mich.App. 494, 502, 384 N.W.2d 811 (1986) (holding that statements were not hearsay because they were not introduced to prove the truth of the matter asserted). Plaintiff did not offer the evidence to prove that defendants were negligent, and whether Tayeb's alleged statements were accurate is not relevant to the present issue. Plaintiff relied on Tayeb's alleged statement only to demonstrate how and why he became aware of his possible malpractice claim, not that Mishra was negligent or that his negligence was a proximate cause of any damages. The trial court therefore erred by ruling that the affidavit contained inadmissible hearsay for this purpose. See *id*.

All Citations

--- N.W.2d ----, 316 Mich.App. 621, 2016 WL 4145696

End of Document